No. 05-

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IN THE

Supreme Court of the United States

TIMOTHY SLAGLE,

Petitioner,

v.

COUNTY OF CLARION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Third Circuit Court of Appeals has erred in holding that an administrative complaint filed with the Equal Employment Opportunity Commission must, on its face, allege that the discrimination was because of race, color, religion, sex or national origin in order to be considered protected activity under Title VII for the purposes of a subsequent retaliation action?

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CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

The unpublished opinion of the Third Circuit Court of Appeals, dated January 12, 2006, has been reproduced in the Appendix at App. 1a. The District Court did not publish an opinion in this case. The District Court's opinion has been reproduced in the Appendix at App. 17a.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Third Circuit entered its judgment on January 12, 2006. *See* App. 1a.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated in any manner* in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added).

STATEMENT OF THE CASE

Petitioner, Timothy Slagle, was employed as a correctional officer at the Clarion County Jail ("Jail") from October 1996 through February 2002. Several separate incidents are relevant to this Petition for Writ of Certiorari. In April 2001, Slagle, using testing material belonging to the Jail, had administered an HIV test to himself at his home after being exposed to the bodily fluids of an inmate. He then submitted the test to the Pennsylvania Department of Health for analysis without identifying the subject of the test. The Pennsylvania Department of Health mailed the results of the anonymous test back to the Jail, addressed to Plaintiff. Deputy Warden Traister, who received the results of the test, assumed that the test had been administered to an inmate. Because he had not authorized any HIV testing of inmates, he initiated an internal investigation to determine who had been the subject of the unauthorized testing. Although initially refusing to cooperate on right to privacy grounds, Plaintiff subsequently admitted at a hearing that he had been the subject of the test.

In a separate incident that occurred on May 11, 2001, Slagle allegedly told the officer in charge who was on duty that a state trooper had engaged in inappropriate behavior during an inmate interview. Later that day Warden John Rowley accused Slagle of going outside the chain of command by threatening to report the trooper's behavior to his supervisor. Slagle denied making any such threat. By later dated May 14, 2001, Slagle received a one-day suspension for his failure to cooperate with the deputy warden's investigation of the HIV test and for his May 11 "threat" to go outside the chain of command. Plaintiff subsequently received a two-week suspension without pay in July 2001

for allegedly making inappropriate comments to a female inmate and sexually harassing a female correctional officer.

On September 10, 2001, Slagle filed a complaint against Clarion County with the Equal Employment Opportunity Commission (EEOC) in connection with the May 2001 and July 2001 suspensions. In the complaint, Slagle stated "the Respondent discriminated against me because of whistleblowing, in violation of my Civil Rights, and invasion of privacy. By letter dated October 31, 2001, the EEOC notified Slagle that it had dismissed his charge because the facts alleged failed to state a claim under any of the statutes enforced by the Commission.

On January 2, 2002, Slagle was advised that he was being discharged from his position at the Jail for gross insubordination and for allegedly lying that he had not received notice of the denial of his request to have a vacation day on December 25, 2001, and for not working that day pending a *Loudermill* hearing. Slagle filed a union grievance in January related to his discharge which he withdrew a week later. Slagle filed a second charge with the EEOC on January 15, 2002, alleging that his employment was terminated in retaliation for having filed the September 2001 EEOC charge.

Approximately two weeks later, Slagle was advised that he was not being terminated. Rather, Slagle would be suspended without pay through February 2, 2002, but would not lose seniority or other benefits during the suspension.

On February 8, 2002, Slagle filed a third charge with the EEOC alleging that Clarion County discriminated against him because of his gender. This charge was dismissed by the EEOC, based on the finding that the EEOC was unable to

conclude that the information obtained established a violation of the statute.

Thereafter, on May 29, 2002, Slagle filed this action against Clarion County in the United Stated District Court for the Western District of Pennsylvania alleging that this employment had been constructively discharged in retaliation for his prior protected activity, specifically the September 2001 charge. As part of this claim, Slagle alleged that following the filing of the September 2001 charge, he was subjected to a pattern of antagonism in the workplace in the form of unwarranted work criticism, exclusion from inmate hearings, cancellation of a previously scheduled vacation without cause and unwarranted disciplinary action.

The District Court granted summary judgment for Clarion County based on the finding that Slagle had not established that he had engaged in protected activity, an essential element of the prima facie case portion of the analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Slagle filed a timely appeal arguing that the September 2001 EEOC charge constituted protected activity under Title VII of the Civil Rights Act of 1964 and, accordingly, that it was error for the District Court to dismiss Slagle's retaliation claim based on the finding that he had not engaged in protected activity.

Oral argument was held before the Third Circuit Court of Appeals on July 14, 2005. Subsequently, the Third Circuit issued a precedential opinion dated January 12, 2006. In this decision, the Third Circuit held that Slagle's filing of the September 2001 EEOC charge was not protected activity

within the meaning of Title VII because the charge did not specifically refer to any of the classes protected under Title VII, i.e. race, color, religion, sex, or national origin, but, rather, merely alleged unspecified civil rights violations.

This petition arises from the January 12, 2006 decision of the Third Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

As is clear from Rule 10 of this Court's Rules, a petition for a writ of certiorari will be granted only for truly compelling reasons. This standard is met under the facts of this case.

Section 8-II of the EEOC Compliance Manual applies to all sectors of these United States. Section 8-II states that a plaintiff is protected under the participation clause of Title VII, 42 U.S.C. § 2000e-3(a), regardless of whether the allegations in the original charge were valid or reasonable. *Johnson v. University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000); *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

It is enough under the Title VII anti-retaliation provisions that the charge be timely filed in an effort to engage in protected activity; that the employer takes adverse action against the employee after or contemporaneously with the protected activity and a causal link exists between the protected activity and the employer's adverse action. *Weston v. Pennsylvania*, 251 F.3d 420, 430 (3d Cir. 2001).

The Third Circuit's precedential holding in this case creates confusion throughout the Circuits, including the Third

Circuit, as it is contrary to the EEOC Compliance Manual and the relevant established precedent cited above. Specifically, the Third Circuit's holding that an administrative complaint must include specific reference to race, color, religion, sex or national origin in order to be protected activity under Title VII is in conflict with previous precedent holding that Title VII's protection was not lost if the employee was wrong on the merits of the charge, or even if the contents of the charge were malicious, defamatory or wrong. Accordingly this Court's exercise of its supervisory powers is appropriate and necessary.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT AN ADMINISTRATIVE COMPLAINT FILED WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION MUST, ON ITS FACE, ALLEGE THAT THE DISCRIMINATION WAS BECAUSE OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN ORDER TO BE CONSIDERED PROTECTED ACTIVITY UNDER TITLE VII FOR THE PURPOSES OF A SUBSEQUENT RETALIATION ACTION.

The United States Supreme Court should overrule the Third Circuit Court of Appeals' precedential holding that Title VII absolutely mandates reference to race, color, religion, sex or national origin in the administrative complaint in order for Title VII's protections to apply to that charge.

Petitioner agrees that reference must be made to one of the specific classes protected under Title VII in order for a

discrimination claim to subsequently be brought under Title VII. However, when the issue is whether the employer retaliated against the employee for filing a charge of discrimination, as is the issue in this case, the allegations of the charge are irrelevant. All that should be essential is that the charge be timely filed and the employer have notice of it at the time an adverse action is taken in retaliation for the employee having sought EEOC assistance by the filing of the charge of employment discrimination.

At the time Slagle filed the September 2001 charge of discrimination with the EEOC, he was still gainfully employed at the Jail. Slagle sought to save his employment by announcing to the EEOC that he had evidence that his civil rights had been violated. At this time, although he believed himself to be the victim of discrimination based on events occurring shortly before September 2001, he did not yet possess evidence indicating the basis of this discrimination. Hence, he alleged general civil rights violations. When he later learned that the Jail was seeking to replace him with a female employee, he filed the February 2002 charge specifically alleging gender discrimination.

Slagle contends that filing the September 2001 charge of discrimination was activity protected under Title VII, 42 U.S.C. § 2000e-3(a), even though it only makes general allegations of civil rights violations rather than specific reference to one of the classes protected under the provisions of Title VII.

The Sixth Circuit has held that a plaintiff is protected under the participation clause of Title VII regardless of whether the allegations in the original charge were valid or reasonable. *Johnson v. University of Cincinnati*, 215 F.3d

561, 582 (6th Cir. 2000). The exceptionally broad protections of the participation clause extends to persons who have participated in any manner in Title VII proceedings. Protection is not lost if the employee is wrong on the merits of the charge nor is protection lost if the contents of the charge are malicious, defamatory or wrong. *Id.*

The First Circuit has held in a similar manner. *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

The Third Circuit based its findings in this case on its prior decision in *Barber v. CSX Distribution Services*, 68 F.3d 694, 701-702 (3d Cir. 1995), which held that general complaints of unfair treatment are not protected activities under Title VII. However, *Barber* involved a letter sent to the employer and not a charge of discrimination. *Id.* Furthermore, this letter did not allege that civil rights violations had occurred. *Id.*

Based on the foregoing, the Circuits are in need of a clear standard from the U.S. Supreme Court as to whether any specific language is required in a charge of discrimination in order for that charge to constitute protected activity under Title VII.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JANUARY 12, 2006

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-2622

TIMOTHY A. SLAGLE,

Appellant

v.

COUNTY OF CLARION;
CLARION COUNTY JAIL

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 02-cv-00960)
District Judge: Hon. Terrence F. McVerry

Argued July 14, 2005.

Before SLOVITER, McKEE and WEIS, *Circuit Judges.*

(Filed: January 12, 2006)

Appendix A

OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

Timothy A. Slagle, a former correctional officer at the Clarion County Jail in Pennsylvania, appeals from the Order of the District Court granting summary judgment in favor of his employer, the County of Clarion, and dismissing Slagle's claims of retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3a, and the Pennsylvania Human Relations Act ("PHRA").[1] We review a grant of summary judgment de novo, applying the same standard as did the district court. *Antonelli v. New Jersey,* 419 F.3d 267, 272 (3d Cir.2005).

I.

Slagle was employed as a correctional officer at the Clarion County Jail ("Jail") from October 1996 to February 2002. Several separate incidents are relevant to the issue before us. In April 2001, Slagle, using testing material belonging to the Jail, gave himself an HIV test at his home and submitted the test to the Pennsylvania Department of Health for analysis without identifying the subject of the test. The Pennsylvania Department of Health mailed the results

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1. Slagle also raises a claim of hostile work environment. Because Slagle mentions this claim only once in his brief and only in passing, we hold that Slagle waived the claim. *See Laborers' Int'l Union v. Foster Wheeler Corp.,* 26 F.3d 375, 398 (3d Cir.1994) (finding an issue waived because "passing reference to an issue . . . will not suffice to bring that issue before this court") (citation omitted).

of the anonymous test back to the Jail. Deputy Warden Traister, who received the results of the test, assumed that the test had been administered to an inmate. Because he had not authorized any HIV testing of inmates, he began an internal investigation to determine who had conducted the unauthorized HIV test. Slagle refused to cooperate with the investigation but, at a hearing held subsequently, he admitted that he was the subject of the test.

In a separate incident that occurred on May 11, 2001, Slagle allegedly told the officer in charge who was on duty that a state trooper had engaged in inappropriate behavior during an inmate interview. Later that day Warden John Rowley accused Slagle of going outside the chain of command by threatening to report the trooper's behavior to his supervisor. Slagle denied making any such threat. By letter dated May 14, 2001, Slagle received a one-day suspension for his failure to cooperate with the deputy warden's investigation of the HIV test and for his May 11 "threat" to go outside the chain of command. In addition, Slagle received a two-week suspension without pay in July, 2001, for making inappropriate comments to a female inmate and sexually harassing a female correctional officer.

On September 10, 2001, Slagle filed a complaint against Clarion County with the Equal Employment Opportunity Commission ("EEOC") in connection with his May 2001 and July 2001 suspensions. In the complaint, Slagle stated: "the Respondent discriminated against me because of whistleblowing, in violation of my Civil Rights, and invasion of privacy." App. at 96. By letter dated October 31, 2001, the EEOC notified Slagle that it dismissed his charge because

"the facts [he] alleg[ed] failed to state a claim under any of the statutes enforced by the Commission." App. at 14.

On January 2, 2002, Slagle was advised that he was being discharged from his position at the Jail for gross insubordination and for allegedly lying that he had not received notice of the denial of his request to have a vacation day on December 25, 2001, and for not working on that day pending a *Loudermill* hearing.[2] Slagle filed a union grievance in January related to his discharge, which he withdrew a week later. Slagle filed a second charge with the EEOC on January 15, 2002, alleging that his employment was terminated in retaliation for having filed the September 2001 EEOC charge.

Approximately two weeks later, the Director of Finance and Human Resources for Clarion County advised Slagle that Clarion County had determined that he would not be terminated. Instead, he would be suspended without pay through February 2, 2002, but would not lose seniority or other benefits during the suspension. Nonetheless, Slagle never returned to work after January 2, 2002.

On February 8, 2002, Slagle filed a third charge with the EEOC in which he asserted that Clarion County discriminated against him "because of [his] gender, male, in

2. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), the Supreme Court held that a public employee is entitled to a "pretermination hearing [that] need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 545-46, 105 S.Ct. 1487.

violation of Title VII as to gender discrimination and the PHRA." App. at 129. The EEOC notified Slagle that his complaint was dismissed because "the Commission [was] unable to conclude that the information obtained establish[ed] violations of the statutes." App. at 12.

Slagle thereafter filed this lawsuit on May 29, 2002, against Clarion County in the United States District Court for the Western District of Pennsylvania, alleging that his termination was a result of unlawful retaliation in violation of Title VII.[3] Slagle alleges that after he filed his charge with the EEOC in September 2001, he was subject to antagonism at the workplace in the form of unwarranted work criticism, cancellation of a previously scheduled vacation, and unwarranted disciplinary action. He expounds on his complaint by asserting in his brief that he was "excluded from participating in inmate hearings while less experienced correctional officers were selected . . . [and he] began to be reprimanded for minor items . . . that other correctional officers engaged in without being criticized[.]" Appellant's Br. at 6-7.

The District Court granted summary judgment for Clarion County. It applied the framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and held that Slagle had failed to establish a prima facie case.

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3. The District Court dismissed Clarion County Jail as a defendant in this case, stating "it is well established in the Third Circuit that a prison is not a 'person' subject to suit under federal civil rights laws." *Slagle v. County of Clarion and Clarion County Jail*, No. 02- 0960 (W.D. Pa. filed March 6, 2003).

The District Court stated that Slagle "failed to establish that he engaged in protected activity, which is an essential element of a prima facie case of retaliation under Title VII." App. at 41. Slagle appeals.

II.

In reviewing the grant of summary judgment, we must view "the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir.2004). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

To prevail on a claim of retaliatory discharge in violation of Title VII and the analogous provision of the PHRA,[4] Slagle must demonstrate that: 1) he engaged in conduct protected by Title VII; 2) his employer took an adverse action against

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4. In pertinent part, the PHRA states:

> It shall be an unlawful discriminatory practice ... [f]or any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

43 Pa. Cons.Stat. § 955(d).

him either after or contemporaneous with the protected activity; and 3) a causal link exists between his protected conduct and the employer's adverse action. *Weston v. Pennsylvania,* 251 F.3d 420, 430 (3d Cir.2001).[5]

Slagle argues that the District Court erred in holding that he failed to establish that he engaged in conduct protected under Title VII. Title VII prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. The anti-retaliation provision of Title VII provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or *participated in any manner* in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added).

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5. This court has stated " 'that the PHRA is to be interpreted as identical to federal anti-discrimination laws except where there is something specifically different in its language requiring that it be treated differently.' " *Fasold v. Justice,* 409 F.3d 178, 184 n. 8 (3d Cir.2005) (quoting *Fogleman v. Mercy Hosp., Inc.,* 283 F.3d 561, 567 (3d Cir.2002)). The PHRA provisions here at issue contain no such language; therefore, we will interpret the implicated provisions of Title VII and PHRA as applying identically in this case and as being governed by the same set of decisional law.

Appendix A

Slagle argues that filing a charge with the EEOC constitutes protected activity under the participation clause, which protects an employee who has "made a charge [or otherwise] participated . . . in an investigation . . . under this subchapter." He asserts that he engaged in protected activity when he filed a charge alleging "unspecified civil rights violations." Appellant's Br. at 14.

The District Court found that Slagle had only made general complaints of unfair treatment. Relying on this court's decision in *Barber v. CSX Distribution Services*, 68 F.3d 694, 701-02 (3d Cir.1995), the District Court stated that "a general complaint of unfair treatment does not translate into a charge of illegal discrimination, and is not protected conduct under Title VII." *Slagle v. County of Clarion*, No. 02-0960, slip op. at 6 (W.D.Pa. May 13, 2004).

In *Barber*, the plaintiff, who was an employee of the defendant, wrote a letter to the defendant's Human Resources Department complaining that an available position had been awarded to a less-qualified person. The plaintiff's position was eliminated soon thereafter, and he filed a suit alleging that his position had been eliminated to retaliate for the letter of complaint and that this retaliation violated the Age Discrimination in Employment Act ("ADEA"). Barber's claim was based on the "opposition clause" of the ADEA, section 704(a), which protects from retaliation employees who oppose any practice made unlawful by Title VII. *See* 29 U.S.C. § 623(d). The District Court had entered judgment for the employer following a jury verdict for Barber, but this court reversed, holding that defendant's failure to promote Barber violated the ADEA. On the other hand, we

affirmed the dismissal of the retaliation claim because Barber's letter to defendants' Human Resources Department did not specifically complain about age discrimination and therefore did "not constitute the requisite 'protected conduct' for a *prima facie* case of retaliation." 68 F.3d at 701-02. The ADEA's provision against retaliatory discharge is identical to that of Title VII. The defect with Barber's retaliation claim was that he never explicitly claimed that he was discriminated against on the basis of age.

In contrast to Barber's claim of unlawful retaliatory discharge which was based on the "opposition clause" of the ADEA, Slagle's claim arises under the "participation clause" of Title VII. Commentators have noted that "[i]t is essential to the analysis of § 704(a) to recognize its two different clauses. . . . The distinction is significant because the levels of statutory protection differ." Barbara L. Schlei & Paul Grossman, *Employment Discrimination Law* 533 (2d ed.1983); *see also Proulx v. Citibank,* 659 F.Supp. 972 (S.D.N.Y.1987) (same); *cf. Robinson v. Southeastern Pa. Transp. Auth.,* 982 F.2d 892, 896 n. 4 (3d Cir.1993) (noting that courts have distinguished between the activities protected by the two clauses of 42 U.S.C. § 2000e-3(a)).

Courts that have interpreted the "participation clause" have held that it offers much broader protection to Title VII employees than does the "opposition clause." *See, e.g., Deravin v. Kerik,* 335 F.3d 195, 203 (2d Cir.2003) ("[C]ourts have consistently recognized [that] the explicit language of § 704(a)'s participation clause is expansive and seemingly contains no limitations."); *Booker v. Brown & Williamson Tobacco Co.,* 879 F.2d 1304, 1312 (6th Cir.1989) (noting

that "courts have generally granted less protection for opposition than for participation" and that the participation clause offers "exceptionally broad protection"); *Sias v. City Demonstration Agency,* 588 F.2d 692, 695 (9th Cir.1978) (stating that the opposition clause serves "a more limited purpose" and is narrower than the participation clause); *Pettway v. American Cast Iron Pipe Co.,* 411 F.2d 998, 1006 n.18 (5th Cir.1969) (noting that the participation clause provides "exceptionally broad" protection for employees covered by Title VII).

The question before us, one of first impression, is whether the participation clause of section 704(a) protects an employee who files a facially invalid claim for retaliatory discharge.

It is well-settled that "[t]he first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *United States v. Cooper,* 396 F.3d 308, 310 (3d Cir.2005) (internal quotation marks and citation omitted). As noted, the statute provides: "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a). The language at issue has a clear and unambiguous meaning. An employee filing a charge is protected only if the charge is brought under "this subchapter." The phrase "this subchapter" refers specifically to 42 U.S.C. §§ 2000e through 2000e-17, the provisions that set forth an employee's rights when an employer has discriminated against him or her on the basis of race, color,

sex, religion, or national origin. It follows that a charge "under this subchapter" is a charge that alleges discrimination on the basis of those prohibited grounds.

Slagle's argument that an employee is protected when s/he files any charge, regardless of its content, is to render the phrase "under this subchapter" meaningless. Such an interpretation is contrary to the accepted rules of statutory interpretation. *See Cooper,* 396 F.3d at 312 ("It is a well known canon of statutory construction that courts should construe statutory language to avoid interpretations that would render any phrase superfluous."); *see also* Philip J. Pfeiffer, *Employment Discrimination Law* 499 (2002) ("The retaliation provisions of [Title VII] do not protect employees from retaliation for filing *any* charge alleging *any* misconduct; to gain protection, the charge—factually supported or not—must allege conduct within the scope of the statute.").

Of course, because Title VII is a remedial statute, it must be interpreted liberally. *See, e.g., Bowers v. NCAA,* 346 F.3d 402, 431 n. 24 (3d Cir.2003) ("We recognize that [ ]Title VII is clearly remedial civil rights legislation. . . ."); *Idahoan Fresh v. Advantage Produce, Inc.,* 157 F.3d 197, 204 (3d Cir.1998) (noting that liberal construction of a statute is appropriate where that statute is remedial). Even if a plaintiff files a complaint with the incorrect agency, but alleges discrimination, s/he is protected by Title VII. *See Hicks v. ABT Assoc., Inc.,* 572 F.2d 960, 969 (3d Cir.1978) ("Defendant's interpretation would mean that if the employee first turned to the wrong agency even with a meritorious claim, that employee could be discharged before he was

eventually directed to the EEOC. Such an interpretation would undercut the purposes of section 704."). Therefore, we require only that the plaintiff file a formal complaint that alleges one or more prohibited grounds in order to be protected under Title VII. But we cannot dispense with the requirement that the plaintiff allege prohibited grounds.

The result we reach is consistent with that reached in cases from the Fourth and the Ninth Circuit Courts of Appeals addressing the issue of whether § 704(a) protects an employee who files a facially invalid claim of retaliatory discharge. In *Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir.1988), the court held that "[t]he mere fact that an employee is participating in an investigation or proceeding involving charges of some sort of discrimination . . . does not automatically trigger the protection afforded under section 704(a). . . ." The *Learned* court found that because the plaintiff's complaint did not allege discrimination prohibited by Title VII, he was not protected from the adverse employment actions taken by his employer in response to his complaint.[6] In *Balazs v. Liebenthal*, 32 F.3d 151, 159-60 (4th Cir.1994), the court relied on *Learned* in holding that the plaintiff's retaliation claim failed because, inter alia, the "plaintiff's previous claim[,] the filing of which was alleged to have given rise to the retaliation claim, was not one cognizable under Title VII of the Civil Rights Act of 1964."

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6. The plaintiff in *Learned* had complained to the state of "discrimination on the basis of physical and mental limitations in violation of state law." *Learned*, 860 F.2d at 930. The *Learned* court also stated that the participation clause requires that "the underlying discrimination must be reasonably perceived as discrimination prohibited by Title VII." *Id.* at 932.

Appendix A

Our holding that Slagle's filing of a facially invalid complaint does not constitute "participation" for the purposes of Title VII does not raise the low bar that Title VII sets for employees seeking protection against retaliation. A plaintiff need only allege discrimination on the basis of race, color, religion, sex, or national origin to be protected from retaliatory discharge under Title VII. Protection is not lost merely because an employee is mistaken on the merits of his or her claim. *See, e.g., Pettway*, 411 F.2d at 1005 (explaining that the participation clause must offer broad protection because individuals draft charges "as best they can without expert legal advice" and often face "a huge industrial employer in this modern day David and Goliath confrontation"). Slagle's complaint, with its vague allegations of "civil rights" violations, did not meet even this low bar.

Once a plaintiff files a facially valid complaint, the plaintiff will be entitled to the broad protections of § 704(a), as interpreted by the EEOC and by numerous courts. Section 8-II of the EEOC Compliance Manual states that a plaintiff is protected under the participation clause "regardless of whether the allegations in the original charge were valid or reasonable." *See also Johnson v. University of Cincinnati*, 215 F.3d 561, 582 (6th Cir.2000) ("The exceptionally broad protections of the participation clause extends to persons who have participated in any manner in Title VII proceedings. . . . Protection is not lost if the employee is wrong on the merits of the charge, . . . nor is protection lost if the contents of the charge are malicious or defamatory as well as wrong.") (internal quotation marks and citation omitted); *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir.1994) ("[T]here is nothing

[in the wording of the participation clause] requiring that the charges be valid, nor even an implied requirement that they be reasonable.") (citation omitted); *Proulx*, 659 F.Supp. at 977 (noting that courts give "basically absolute protection for 'participation conduct.' ") (citation omitted). All that is required is that plaintiff allege in the charge that his or her employer violated Title VII by discriminating against him or her on the basis of race, color, religion, sex, or national origin, in any manner. Slagle did not do so, and therefore he cannot assert a claim for retaliation for filing that charge.

For the reasons set forth, we will affirm the judgment of the District Court.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-2622

TIMOTHY A. SLAGLE,

Appellant

v.

COUNTY OF CLARION;
CLARION COUNTY JAIL

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 02-cv-00960)
District Judge: Hon. Terrence F. McVerry

Before SLOVITER, McKEE and WEIS, *Circuit Judges.*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Western District of Pennsylvania and was argued on July 14, 2005.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered May 14, 2004, be and the same is hereby affirmed. Costs taxed against Appellant.

Appendix A

ATTEST:

s/ [illegible]
Clerk

Dated: January 12, 2006

APPENDIX B — MEMORANDUM OPINION AND ORDER OF COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED MAY 13, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 02-0960

TIMOTHY A. SLAGLE,

Plaintiff,

v.

COUNTY OF CLARION,

Defendant.

MEMORANDUM OPINION AND ORDER OF COURT

Presently before the Court is the DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (*Document No. 22*), the BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (*Document No. 23*), PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (*Document No. 28*), and DEFENDANT'S REPLY TO PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (*Document No. 31*). For the reasons that follow, the motion will be granted.

Appendix B

BACKGROUND

This civil rights case arises from the former employment of Plaintiff, Timothy A. Slagle ("Slagle"), as a correctional officer at the Clarion County Jail. On May 28, 2002, Slagle commenced this action by the filing of a single-count Complaint against the County of Clarion ("Defendant") and the Clarion County Jail.[1] Plaintiff alleges that Defendant terminated his employment in retaliation against him for engaging in activity protected under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

Slagle was employed as a correctional officer at the Clarion County Jail from October 1996 to February 2002. On September 10, 2001, Slagle filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), No. 172A20024, in relation to suspensions he received in May 2001 and July 2001 based on allegations that he had conducted unauthorized HIV testing. *See* Def's Stmt of Mat. Facts, ¶ 19. By a Dismissal and Notice of Rights letter dated October 31, 2001, the EEOC notified Slagle that his charge was being dismissed for failure to state a claim "under any of the statutes enforced by the Commission." Exhibit 3 to Complaint.

Slagle claims that after he filed his charge with the EEOC in September 2001, he was "subjected to antagonism at the workplace in the form of unwarranted work criticism, cancellation of previously scheduled vacation, and

1. By Order of Court dated March 6, 2003, the Clarion County Jail was dismissed as a defendant in the matter.

unwarranted disciplinary action." Complaint, at ¶ 10. On January 2, 2002, Slagle was advised that he was being discharged from his position in Clarion County Corrections. *See* Def's Stmt of Mat. Facts, ¶ 25. On January 13, 2002, a grievance was filed on behalf of Slagle relating to his discharge. *Id.* at ¶ 28. However, on January 17, 2002, Slagle withdrew this grievance. *Id.* at ¶ 30.

On January 15, 2002, Slagle filed a second charge with the EEOC, No. 172A200521, in which he alleged that his employment was terminated in retaliation for having filed the September 2001 charge of discrimination. *Id.* at ¶ 29.

On January 28, 2002, R. Scott Keefer, Director of Finance and Human Resources for Clarion County, advised Slagle that Defendant had determined that Slagle would be suspended without pay effective through February 2, 2002, but that he would not be terminated and would not lose seniority or other benefits during the suspension. *Id.* at ¶ (32. However, Slagle never returned to work after January 2, 2002. *See* P's depo. at 142.

On February 8, 2002, Slagle filed a third charge with the EEOC at No. 172A299627, in which he asserted that Defendant had unlawfully terminated his employment based on his gender and in retaliation for filing EEOC charge 172A20024, all in violation of Title VII.

On May 29, 2002, Plaintiff filed the instant lawsuit alleging that his termination was a result of unlawful retaliation in violation of Title VII.

Appendix B

Pending before the Court is the Defendant's motion for summary judgment, to which Plaintiff has responded. This matter is now ripe for disposition.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure reads, in pertinent part, as follows:

> [Summary Judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In interpreting Rule 56(c), the United States Supreme Court has stated:

> The plain language . . . mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

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An issue of material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must view the facts in a light most favorable to the non-moving party and the burden of establishing that no genuine issue of material fact exists rests with the movant. *Id.* at 242. The "existence of disputed issues of material fact should be ascertained by resolving all inferences, doubts and issues of credibility against the moving party." *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (3d Cir. 1978) *(quoting Smith v. Pittsburgh Gage & Supply* Co., 464 F.2d 870, 874 (3d Cir. 1972)). Final credibility determinations on material issues cannot be made in the context of a motion for summary judgment, nor can the district court weigh the evidence. *Josey v. Hollingsworth Corp.*, 996 F.2d 632 (3d Cir. 1993); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993).

When the non-moving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing' — that is, pointing out to the District Court — that there is an absence of evidence to support the non-moving party's case." *Celotex*, 477 U.S. at 325. If the moving party has carried this burden, the burden shifts to the non-moving party who cannot rest on the allegations of the pleadings and must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Petruzzi's IGA Supermarkets*, 998 F.2d at 1230. When the non-moving party's evidence in opposition to a properly supported motion for summary judgment is "merely

colorable" or "not significantly probative," the court may grant summary judgment. *Anderson*, 477 U.S. at 249-50.

In a Title VII lawsuit, the familiar *McDonnell Douglas* formulation[2] regarding the appropriate burdens of proof and allocation of production of evidence govern and guide the analysis of the evidence presented on a motion for summary judgment. The *prima facie* case under the *McDonnell Douglas* "pretext framework is not intended to be onerous." *Sempier v. Johnson & Higgins, 45* F.3d 724, 728 (3d Cir.), *cert. denied*, 515 U.S. 1159 (1995). The *prima facie* case raises an inference of discrimination because the courts presume that these acts, if otherwise unexplained, are "more likely than not based on the consideration of impermissible factors." *Id.* However, a party opposing summary judgment must do more than rest upon mere allegations, general denials, and vague statements.

Discussion

Title VII, 42 U.S.C. § 2000e-3(a), provides as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice under this Subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Subchapter.

---

2. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Appendix B

Pursuant to subsection (m) of 42 U.S.C. § 2000e, an unlawful employment practice is established "when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

To meet his burden of establishing a *prima facie* case of discrimination for purposes of his retaliation claim, Slagle must demonstrate that: (1) he engaged in conduct protected by Title VII; (2) Defendant, his employer, took an adverse action against him either after or contemporaneous with the protected activity; and (3) a causal link exists between his protected conduct and Defendant's adverse action. *Weston v. Pennsylvania,* 251 F.2d 420, 430 (3d Cir. 2001).

Defendant argues that Slagle's claim fails because he cannot establish a *prima facie* case of retaliation under Title VII; namely that Plaintiff cannot establish that he engaged in "protected activity." Plaintiff responds that "it is undisputed that Plaintiff filed an EEOC charge on September 10, 2001 that alleged unspecified civil rights violations. . . . Thus, there is at least a question of material fact as to whether the September 10, 2001 charge, which alleges unspecified civil rights violations . . . constitutes protected activity under Title VII." Pl's Br. at 4.

Title VII makes it an unlawful employment practice for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-(3)(a). It is an unlawful employment practice for an employer "to

discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e- 2(a)(1). Accordingly, filing a claim of discrimination is protected conduct.

However, a general complaint of unfair treatment does not translate into a charge of illegal discrimination, and is not protected conduct under Title VII. *See Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 701-02 (3d Cir. 1995) (holding that the plaintiff's letter to the human resources department complaining of unfair treatment in general and not specifically complaining about age discrimination did not constitute protected activity). The complaint must specifically mention the plaintiff's belief that he or she was discriminated against on account of his or her membership in some protected class. *See id.*

Here, Slagle argues that his EEOC charge on September 10, 2001 is sufficient evidence to demonstrate that he engaged in "protected conduct." The September 10, 2001 EEOC charge reads, in pertinent part, as follows:

> "Cause of Discrimination Based on: Whistleblowing/Civil Rights Violation/Invasion of Privacy/Work Conditions.
>
> . . .
>
> 1. I have been an employee of the Respondent since October, 1996. I am employed as a

correctional officer for five (5) years with the Respondent since 1996. I was notified in May, 2001 that I had done unauthorized testing at the jail which was not true. I had a one day suspension in May, 2001. Then I was suspended again in July, 2001. The testing had been on myself. The reason given for my suspension was performance. Throughout the five (5) years my performance was always exemplary.

2. In May, 2001 I was informed by Respondent that I was being suspended and again in July, 2001. My privacy rights precluded me from telling about my testing. I was upset about the jail procedures, drugs, inmate care.

3. *I believe that the Respondent discriminated against me because of whistleblowing, in violation of my Civil Rights and invasion of privacy. Federal and State law.*

4. At all times I worked at Clarion, Pennsylvania facility."

Charge of Discrimination, Exhibit R, Def's Stmt of Uncontested Mat. Facts (Doc. No. 24) (emphasis added).

The Court finds and rules that at best, the evidence is that in September, 2001, Slagle complained in general terms that he thought he had been discriminated against in violation of his "Civil Rights." None of the evidence, however,

supports an inference that his employer knew he was complaining of discriminatory practices based on his "race, color, religion, sex, or national origin." A mere reference to being treated unfairly is insufficient to establish that Slagle engaged in protected activity under Title VII. *See Barber,* 68 F.3d at 701-02; *Gautney v. Amerigas Propane, Inc.*, 107 F. Supp. 2d 634 (E. D. Pa. 2000) (complaint in general terms of being treated differently was not protected activity); *DeJoy v. Comcast Cable Communications Inc.*, 968 F. Supp. 963 (D. N.J. 1997) (plaintiff's actions and statements were too vague to be considered "protected conduct"); *Sosky v. Int'l Mill Serv., Inc.*, 1996 WL 32193, *10 (E.D. Pa. Jan. 25, 1996) (general complaint of unfair treatment to Human Resources Department without mentioning that age was a factor was not protected activity), *aff'd,* 103 F.3d 114 (3d Cir. 1996).

The Court finds that Slagle's claim fails because he has failed to establish that he engaged in protected activity, which is an essential element of a prima facie case of retaliation under Title VII. Accordingly, summary judgment will be granted in favor of Defendant.

An appropriate Order follows.

Appendix B

ORDER OF COURT

AND NOW, this 13th day of May, 2004, it is hereby **ORDERED, ADJUDGED,** AND **DECREED** that Defendant's Motion for Summary Judgment is **GRANTED**, this action is dismissed with prejudice, and judgment is entered in favor of Defendant, County of Clarion.

BY THE COURT:

s/ Terrence F. McVerry
Terrence F. McVerry
United States District Judge

(2)

No. 05-1303

IN THE

Supreme Court of the United States

TIMOTHY SLAGLE,

Petitioner,

v.

COUNTY OF CLARION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Does the Petitioner fail to present compelling reasons for granting of the Petition for Writ of Certiorari, when the Third Circuit's opinion is consistent with the plain language used in Title VII, is consistent with the other Circuits which have addressed the issue, and when the cases cited by the Petitioner are clearly distinguishable from this case?

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INTRODUCTION

Petitioner has failed to present any compelling reason why his Petition for Writ of Certiorari should be granted. *See* Sup. Ct. R. 10. Specifically, petitioner concedes by omission that the Third Circuit's decision does not conflict with any decision of this Court. Further, Petitioner fails to establish that the Third Circuit's decision conflicts with any decision of the First or Sixth Circuits as alleged. To the contrary, the decision of the Third Circuit is consistent with the other circuit courts which have addressed the issue of whether the mere filing of a claim without any basis for believing Title VII rights have been violated can support a retaliatory termination case.

The First and Sixth Circuit decisions cited by the petitioner are inapposite to the issue before the Third Circuit. Both the Sixth Circuit opinion in *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000) and the First Circuit opinion in *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994) stand for the proposition that if an employee believes that his Title VII rights have been violated, and files a complaint articulating such a basis, he may not be retaliated against simply because his belief may ultimately be found by the EEOC to be wrong, malicious or defamatory. Even in these cases, there is at least *some* stated and identifiable grounds for believing that Title VII rights have been violated. The petitioner did not have an incorrect belief his Title VII rights were violated - he had *no* belief and failed to articulate any discrimination whatsoever on the basis of race, color, sex, or national origin.

The Third Circuit properly interpreted the plain language of Title VII, holding that in order to state a *prima facie* claim of retaliatory discharge, a plaintiff must first articulate a basis for concluding that he or she engaged in activity protected by Title VII. Because petitioner could not, and did not articulate a proper basis for his claim, summary judgment was appropriate.

Further, the petitioner suggests that the Court grant certiorari in order to create a new rule, which by implication will permit an employee who has no basis for believing his Title VII rights have been violated to file a baseless claim with the Equal Employment Opportunity Commission, making the employer subject to a retaliatory termination lawsuit if the employee is terminated before the dismissal of the dubious EEOC charge. If the Court were to adopt petitioner's analysis, it would pave an avenue for abuse and thereby open the floodgates for spurious claims before the EEOC, as well as for retaliatory termination suits such employees would manufacture.

In short, petitioner failed to meet his burden of proving that there are any compelling reasons for certiorari to be granted. Accordingly, the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioner, a thirty-two year old white male, worked as a correctional officer at the Clarion County Jail for the respondent from October 1996 until February 2002. (App. 58-59, 127). Certain incidents of misconduct are pertinent to the filing of the charge with the Equal Employment Opportunity Commission (EEOC) that underlies this action.

First, in April, 2001, Petitioner Slagle self-administered an HIV test using material belonging to the Jail and anonymously submitted it to the Pennsylvania Department of Health for testing. The Department of Health mailed the results back to the Jail. The deputy warden assumed that it had been administered to an inmate. Because the deputy warden had not authorized the test, he initiated an internal investigation to determine who conducted the unauthorized test. Slagle initially refused to cooperate with the investigation, but later admitted that he was the individual who conducted the unauthorized test. Slagle was not required to identify who was the subject of the test.

Second, in May of 2001, Slagle claims to have reported to an officer in charge that during an interview of a inmate, a state trooper acted inappropriately. The warden informed Slagle that he had gone outside the chain of command by threatening to report the trooper's behavior to his supervisor.

A third incident occurred on July 7, 2001, where the petitioner made inappropriate sexual comments to a female correctional officer. On July 13, 2001, he was suspended pending an investigation. (App. 88). On July 25, 2001, he received a two week suspension for that misconduct. (App. 90).

In May, 2001, the petitioner received a one-day suspension for his refusal to cooperate into the investigation of his unauthorized testing and his threat to go outside the chain of command on the trooper conduct issues. In July, 2001, he received a second, two week suspension for inappropriate behavior towards the female correctional officer.

In September of 2001, Petitioner filed a charge of discrimination with the EEOC in relation to the two suspensions. (App. 96). The charge failed to identify any practice or conduct by the employer that allegedly violated Title VII. *Id.* Rather, the charge, prepared with the assistance of counsel, alleged that the employer discriminated against him "because of whistleblowing, in violation of [his] Civil Rights and invasion of [his] privacy." The pertinent portion of the charge is as follows:

> 1. I have been an employee of the Respondent since October, 1996. I am employed as a correctional officer for five (5) years with the Respondent since 1996. I was notified in May, 2001 that I had done unauthorized testing at the jail which was not true. I had a one day suspension in May, 2001. Then I was suspended again in July, 2001. The testing had been on myself. The reason given for my suspension was performance. Throughout the five (5) years my performance was always exemplary.
>
> 2. In May, 2001 I was informed by Respondent that I was being suspended and again in July, 2001. My privacy rights precluded me from telling about my testing. I was upset about the jail procedures, drugs, inmate care.
>
> 3. *I believe that the Respondent discriminated against me because of whistleblowing, in violation of my Civil Rights and invasion of privacy. Federal and State law.*

(Charge of Discrimination, App. 96) (Emphasis added). After an investigation, the EEOC dismissed the charge because the facts alleged did not state a claim under any of the statutes enforced by the commission. (App. 14).

On January 2, 2002, Petitioner was discharged for gross insubordination and lying while on probation. (App. 111-12). Petitioner grieved the discharge, although the grievance was later withdrawn. (App. 124). The employer then modified the discipline to a thirty-day suspension without pay. (App. 126).

While serving that suspension, Petitioner filed a second charge of discrimination with the EEOC. (App. 117). This charge, also prepared with the assistance of counsel, alleged that Petitioner was wrongfully terminated on or about January 2, 2002 in retaliation for the September 2001 EEOC charge. (App. 177). The charge, like the first, only contained a general averment of discrimination. *Id.* Following an investigation, the EEOC dismissed this charge as well, because the EEOC was unable to conclude that the information it obtained established a violation of any governing statute. (App. 123).

Despite the fact that his discipline was reduced to a thirty-day suspension, Petitioner never returned to work after January 2, 2002. On February 8, 2002, Petitioner filed a third charge with the EEOC, alleging with the aid of counsel, that he was unlawfully terminated in January 2002 based upon his gender and in retaliation for the first EEOC charge. (App. 129-30). Again, the employer responded in detail and the EEOC dismissed the charge. The third investigation likewise revealed no information establishing the violation of any statute. (App. 135).

Petitioner initiated this lawsuit on May 29, 2002 alleging that he was retaliated against for filing the September, 2001 charge with the EEOC. Following the entry of summary judgment by the District Court on May 13, 2004, petitioner appealed to the Third Circuit. The Third Circuit affirmed

the District Court on January 12, 2006, holding that the petitioner failed to establish a *prima facie* claim of retaliatory termination. A petition for writ of certiorari is presently before this Honorable Court.

REASONS FOR DENYING THE PETITION

The Petition should be denied because the *Slagle* decision does not create a split between the Third and First or Sixth Circuits. The cases cited by petitioner are clearly distinguishable. Further, the Third Circuit's opinion is consistent with the express language of Title VII, as well as the rulings of the other circuit courts which have reviewed the issue of whether a charge that does not identify any Title VII protected activity can support a subsequent retaliatory termination claim.

I. The Third Circuit properly applied the express language of 42 U.S.C. § 2000e-3(a).

Before addressing petitioner's sole stated reason for granting the petition, it is important to note that the Third Circuit applied the express language of Title VII and the well-settled case law interpreting it in holding that petitioner failed to state a *prima facie* claim of retaliatory termination, as there was no allegedly unlawful employment practice at issue.

The Third Circuit noted that in order to state a *prima facie* claim of retaliatory termination, a plaintiff must prove (1) that he engaged in conduct that falls within the protection of Title VII, (2) either contemporaneous with the protected activity or subsequently, his employer took an adverse action against him, and (3) causation between the employer's

adverse action and the Title VII protected conduct. *Slagle v. County of Clarion*, 435 F.3d 262, 264 (3rd Cir. 2006) (citing *Weston v. Pennsylvania*, 251 F.3d 420, 430 (3rd Cir. 2001)). This test is consistently employed throughout the circuits. *See, e.g., Wyatt v. City of Boston*, 35 F.3d 13, 16 (1st Cir. 1994); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576 (6th Cir. 2000).

Title VII requires that to establish an unlawful employment practice, a plaintiff must "demonstrate[] that race, color, religion, sex or national origin was a motivating factor for [the] employment practice . . ." 42 U.S.C. § 2000e-2(m). If an unlawful employment practice is motivated by race, color, religion, sex or national origin, Title VII prohibits discrimination against employees for opposition to such unlawful employment practices and participation in investigations and proceedings into such unlawful practices. Specifically, Section 704(a) of Title VII provides

> [I]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because the [employee] has opposed any practice made unlawful under this Subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this Subchapter*.

42 U.S.C. § 2000e-3(a) (Emphasis added). Petitioner claims that the retaliation was based in his filing of an EEOC charge, and that mere filing constitutes "participation" in an investigation, proceeding or hearing under Title VII.

The Third Circuit interpreted the unambiguous language of Section 2000e-3(a) to protect an employee only if he files a charge "under this subchapter", referring to the provisions of 42 U.S.C. §§ 2000e through 200e-17, which "set forth an employee's rights when an employer has discriminated against him or her on the basis of race, color, sex, religion or national origin." *Slagle*, 435 F.3d at 266-67.

The Third Circuit noted that "Slagle's argument that an employee is protected when s/he files any charge, regardless of its content, is to render the phrase 'under this subchapter' meaningless." *Id.* at 267. Therefore, the Third Circuit held

> [W]e require only that the plaintiff file a formal complaint that alleges one or more prohibited grounds [race, color, religion, sex, or national origin] in order to be protected under Title VII. But we cannot dispense with the requirement that the plaintiff allege prohibited grounds.

Id. All that is required is that a plaintiff allege "discrimination on the basis of race, color, religion, sex, or national origin to be protected from retaliatory discharge under Title VII." *Id.* An employee does not lose his protection merely for being "mistaken on the merits of his or her claim." *Id.* Because the petitioner failed to satisfy even this minimal requirement imposed by Section 2000e-3(a), summary judgment was properly granted to the respondent. *Id.*

II. The Third Circuit's well reasoned opinion does not conflict with a decision of another U.S. court of appeals on an important matter.

Plaintiff cites only one consideration governing review on certiorari under Supreme Court Rule 10 - that the Third Circuit's decision creates a conflict with the decisions of the Sixth and First Circuits. To the contrary, the cases cited by petitioner do not conflict in any way with the Third Circuit's holding in *Slagle*. Accordingly, there is no conflict for which certiorari should be granted.

A. The Third Circuit's opinion does not conflict with the Sixth Circuit's decision in *Johnson v. University of Cincinnati*.

First, Petitioner claims a split in authority between the Third Circuit and the Sixth Circuit as to what is required to state a *prima facie* retaliatory termination claim. He alleges that under *Johnson v. University of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), a plaintiff is protected under the participation clause regardless of whether the original charges were valid or reasonable. However, the petitioner misapprehends the Sixth Circuit's decision in *Johnson*.

Johnson was an African American male who was the vice president for human resources and human relations for a university, and as such was charged with providing equal opportunities in employment, questioned his organization's commitment to diversity in giving what he considered to be excessive waivers of a hiring process designed to ensure minorities were considered for positions. *Id.* at 566. He believed that as a result of such advocacy for minorities, he was subjected to discrimination because he was not permitted

to participate in human resource matters for the university's hospital. *Id.* at 570.

As a result of this perceived discrimination by his employer, Johnson filed an EEOC claim alleging racial discrimination and the advocacy of minority and women's rights. *Id.* He subsequently received a poor performance review, which he disputed in a memorandum. *Id.* He was terminated the next day. *Id.*

Johnson filed an action under Title VII and Section 1981 alleging racial discrimination, as well as opposition discrimination for his advocacy of minorities and women, and retaliatory termination for his participation in filing the EEOC claim. *Id.* at 572.

The district court granted the employer summary judgment, opining that as to the plaintiff's claims under the participation clause, he could not have reasonably believed that his rights were violated, and that Johnson merely filed the EEOC claim as a protective measure because he was aware that his employer was dissatisfied with his job performance. *Id.* at 581-82.

The Sixth Circuit disagreed. The Sixth Circuit held that the district court improperly determined plaintiff's motive and good faith in filing the charge, and noted that under Title VII, "protection is not lost if the employee is wrong on the merits of the charge, nor is protection lost if the contents of the charge are malicious or defamatory as well as wrong." *Id.* (citing *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998,1007 (5th Cir. 1969), *Womack v. Munson*, 619 F.2d 1292, 1298 (8th Cir. 1980). The court held that Johnson could reasonably have believed that he was the victim of

discrimination, and that he filed an EEOC charge on that basis. *Id.* Therefore, because he filed "a complaint with the EEOC alleging discrimination on the basis of minority and women's rights[,]" subsequently received a poor performance review, responded to the poor review accusing his employer of retaliation, and was subsequently terminated, he stated a *prima facie* claim. *Id.* at 582-83. Accordingly, the grant of summary judgment was reversed. *Id.* at 583.

Johnson is inapposite to the facts of this case because Johnson filed an EEOC charge *alleging Title VII protected activity based on racial and sexual discrimination.* The proposition in *Johnson* that if an employee files a complaint alleging a discrimination based on Title VII protected activity, then the employee does not lose Title VII's protections simply because the belief that discrimination occurred was wrong, malicious, or is defamatory, does not go to whether the person making the claim believes that he is being discriminated against on the basis of Title VII activity. Unlike the plaintiff in *Johnson*, Slagle made no such claim that identified the *type* of discrimination at issue.

A person can make a claim that his Title VII rights have been violated, but ultimately be wrong. A person can make a claim believing his Title VII rights have been violated, and yet file the claim in a malicious way. A person can also make a claim believing his Title VII rights have been violated, and in so doing make otherwise defamatory remarks. Still, in all these instances, there is at least a basis for believing that some specific Title VII rights have been violated. Slagle, however, did not make a claim believing his Title VII rights had been violated. He had absolutely no basis to believe he was discriminated against because of his race, sex, national origin, etc. at the time he filed his EEOC claim. His filings

make clear there was no such belief since there are no Title VII rights identified or implicated. In that regard, *Johnson* addresses an entirely different scenario than does *Slagle*.

In fact, the Third Circuit cites *Johnson* it its opinion for the proposition that "'protection is not lost if employee is wrong on the merits of the charge, . . . nor is protection lost if the contents of the charge are malicious or defamatory a well as wrong.'" *Slagle*, 425 F.3d at 568 (quoting *Johnson*, 215 F.3d at 582). The Third Circuit recognized that all that a plaintiff must allege in his charge is "that his or her employer violated Title VII by discriminating against him or her on the basis of race, color, religion, sex or national origin, in any manner." *Id.*

Clearly, the issue presented in *Johnson* is entirely different than the issue before the Third Circuit in *Slagle*. There is simply no inconsistency between the analysis employed by the Third and Sixth Circuits in these two cases that would permit certiorari to be granted.

B. The Third Circuit's opinion is not inconsistent with the First Circuit's holding in *Wyatt v. City of Boston*.

Next, petitioner claims that the Third Circuit's decision is inconsistent with the First Circuit's decision in *Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994). The petitioner's reliance on *Wyatt* is misplaced.

In *Wyatt*, a public school teacher filed a complaint with the Massachusetts Commission Against Discrimination (MCAD) opposing what he perceived to be sexual discrimination by his employer, the City of Boston. *Id.* at

14. The school subsequently fired him. *Id.* He filed two *pro se* lawsuits which allegations were not summarized by the district court so as not to unduly prejudice plaintiff's ability to gain further employment as a teacher, but included a claim for "retaliation." *Id.* The district court dismissed his claims *sua sponte*, holding one claim to be frivolous, and the other demonstrating his employer had a good faith reason to terminate him. *Id.*

The First Circuit reversed, noting that under the participation clause, "'there is nothing in its wording requiring that the charges be valid, or even an implied requirement that they be reasonable.'" *Id.* at 15 (quoting 3 Arthur Larson & Lex K. Larson, *Employment Discrimination* § 87.12(b) at 17-95 (1994)). All the plaintiff had to show was that he (1.) engaged in protected activity, (2) was subsequently discharged, and (3.) that there was a causal connection between the protected activity and the discharge. *Id.* (citing *Hoeppner v. Crotched Mountain Rehabilitation Ctr., Inc.*, 31 F.3d 9, 14 (1st Cir. 1994). Because he filed with the MCAD alleging opposition to sexual harassment and was subsequently fired, that was enough to state a *prima facie* claim. *See id.* at 16. The First Circuit reversed the grant of summary judgment, and remanded the case back to the district court.

Wyatt is distinguishable from *Slagle* in that the plaintiff in *Wyatt* filed a claim with the MCAD *opposing sexual discrimination.*[1] Whether or not his claim had merit, a claim

1. *Wyatt* merely stands for the proposition that a district court is not permitted to dismiss a retaliation claim *sua sponte* when a plaintiff alleges retaliation based on specific activity protected by Title VII, regardless of the district court's subjective belief as to whether the employer had a good faith reason to terminate the employee.

opposing sexual discrimination is a protected activity under Title VII. In *Slagle*, the plaintiff did not file an action opposing any sexual, racial, national origin, or other discrimination prohibited by Title VII. Therefore, the First Circuit's opinion in *Wyatt* is consistent with the Third Circuit's decision in *Slagle*. There is no split in the circuits that would permit the Supreme Court to grant certiorari.

III. The Third Circuit's decision in *Slagle* is consistent with the holdings of the other Circuit Courts which have addressed this issue.

The petitioner fails to acknowledge that, in fact, the other circuits addressing this issue have interpreted Section 2000e in the same manner.

In *Learned v. City of Bellevue*, 860 F.2d 928 (9th Cir. 1988), the plaintiff, a "crew leader" for a city parks and recreation department, sued his employer in state court for "excess damages" under a state statute after suffering a work-related injury. *Id.* at 930. After filing the state suit, the plaintiff was subjected to alleged harassment at work, including a diminution of his responsibilities. *Id.* He filed an action with the Washington Human Relations Commission in which he checked a box that stated:

> I also allege a violation of Title VII of the Civil Rights Act of 1964 and request that this Complaint be filed with the U.S. Employment Opportunity Commission.

Id. A right to sue letter was issued by the EEOC, and a claim filed in district court, alleging discrimination under both the "opposition" and "participation" clauses of Section 704(a)

of Title VII, 42 U.S.C. § 2000e-3. The district court granted summary judgment to the employer, holding that the plaintiff failed to state a viable claim under Title VII.

The Ninth Circuit upheld the grant of summary judgment, noting that under the "participation" clause,

> The mere fact that an employee participating in an investigation or proceeding involving charges of some sort of discrimination . . . does not automatically trigger the protection afforded under section 704(a); the underlying discrimination must reasonably be perceived as discrimination prohibited by Title VII.

Id. at 932. Because the plaintiff "did not . . . even allege a valid Title VII claim[,]" he failed to state a retaliation claim, rendering summary judgment appropriate. *Id.* at 932.

The reasoning employed by the Third Circuit in *Slagle* is therefore consistent with the Ninth Circuit reasoning. In both cases, the employees failed to state any basis upon which it could be determined that the employer had engaged in activity protected by Title VII, and were retaliated against as a result. Both the Third Circuit in *Slagle* and the Ninth Circuit in *Learned* have correctly held that a charge identifying an unlawful practice based on Title VII's protected categories of race, color, sex, religion or national origin must be made before a claim for retaliatory termination can be filed.

The Fourth Circuit reached a similar conclusion in *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994). In *Balazs*, the plaintiff's employer issued statements that plaintiff was guilty of sexually harassing female co-workers and was being

disciplined following an incident at a company picnic in which plaintiff gave an award resembling male genitalia. *Id.* at 153. Plaintiff denied that he had sexually harassed anyone, and filed an EEOC charge that he was demoted from his position as a supervisor as a result of the false accusations, and that he believed that this constituted discrimination under Title VII. *Id.* After the EEOC granted a right to sue letter, an action was filed in district court which alleged, *inter alia*, a retaliation claim based upon his filing of the EEOC charge. *Id.* The EEOC charge included a retaliation claim, indicating a poor work evaluation and a denial of a salary increase were issued, and also set forth that "I believe that I was discriminated against in violation of section 704(a) of the Civil Rights Act of 1964, as amended." *Id.* at 155.

The Fourth Circuit noted that discrimination on the basis of a false charge of sexual harassment is not an action covered by Title VII. *Id.* at 158. Therefore, the court had to address the "serious question of whether the filing with the EEOC of a charge not covered by Title VII will support an action for retaliation against an employer who thereafter discriminates against the employee for having filed the non-covered claim." *Id.*

The Fourth Circuit answered this question in the negative, noting that cases interpreting Title VII have held in a retaliation claim that there is no need that the underlying charge of discrimination ultimately be found true, only that *the underlying charge did not implicate Title VII protected activity*. *Id.* at 159. Accordingly, the plaintiff failed to state a *prima facie* claim for retaliation, so the grant of summary judgment was affirmed.

The facts presented in *Slagle* are even more egregious than those before the court in *Balazs*. In *Balazs*, the plaintiff's allegations are at least tangentially related to matters concerning sex, albeit not those that are protected by Title VII. In *Slagle*, the petitioner had no basis to believe his Title VII rights were violated, and articulated *no* such basis in his EEOC complaint. Indeed, the petitioner did not even reference Title VII, and merely couched his complaint in the vague and non-specific terms of "civil rights." The Fourth Circuit's analysis in *Balazs* makes clear that the analysis of the Third Circuit is proper.

IV. The analysis suggested by the plaintiff, in which a plaintiff may file an action without any basis for believing Title VII rights have been violated, and thereafter be immunized from termination, will open the floodgates of litigation in a way not contemplated by Title VII.

The petitioner attempts to explain away the fact that he did not state the basis for his EEOC claim because he "did not yet possess the basis of this discrimination." Petition for Writ of Certiorari at 7. If fact, he has been unable to point to any articulable basis for any belief his Title VII rights had been violated at the time of filing the relevant EEOC charge. Petitioner argues that rather than being able to connect some adverse employment action to discrimination based on Title VII's protected categories of race, color, sex, or national origin, "[a]ll that should be essential is that the charge be timely filed and that the employer have notice of it[.]" *Id.*

As the Third Circuit noted, Title VII is explicit as to what is required to state a *prima facie* claim. The approach suggested by petitioner does not satisfy the requirements of

Title VII, which requires that an allegation of a violation of Title VII protected activity must first be made. *See* 42 U.S.C. § 2000e-3(a); *Learned*, 860 F.2d at 932; *Balazs*, 32 F.3d at 159.

Accepting petitioner's approach, employees would be free to file claims alleging "discrimination" without any basis or reason to believe their Title VII rights have been violated, then to pursue discovery after the fact to see if they could uncover evidence that would substantiate in some possible way an allegation that the adverse action by their employer was actually motivated by their race, color, sex, or national origin. Under such a system, there would be no requirement that there be any reason whatsoever to believe that improper discrimination had taken place before filing a charge with the EEOC. As a result, the ability of a disgruntled employee to file an action against his or her employer would be virtually unlimited. The filing of such claims would be encouraged, because if the situation causing their displeasure with their employer continued, even if not motivated by discrimination, the employee could seek money damages in a retaliation suit. The floodgates of filings before the EEOC would be opened.

The opening of the floodgates would not be confined to the EEOC. As an unintended consequence of this Court's adoption of petitioner's analysis, disgruntled employees would could file baseless claims, knowing that employers could not terminate them until the EEOC claim was dismissed or face a retaliatory termination claim. Such employees could use this process to prevent their termination virtually indefinitely by allowing the threat of a retaliation claim to hang over the employer's head. In turn, the floodgates of litigation in district court would be opened. If an employee can use the filing of meritless EEOC claims as a shield against

termination, the petitioner's analysis will also permit them to pursue baseless retaliation claims in federal court if they are ultimately discharged.

The Third Circuit's analysis properly interprets the appropriate statutes and prohibits this abuse. As it is consistent with the law, and does not create greater opportunities for abuse of the EEOC or court systems, there are no compelling reasons for the Supreme Court to hear this case.

CONCLUSION

The petitioner has not established any compelling reason for this Court to grant the Petition for Certiorari. Therefore, the Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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